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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1566

SARGENT-WELCH SCIENTIFIC COMPANY,
Petitioner,

vs.

VENTRON CORPORATION AND VENTRON INSTRUMENTS CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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INDEX.

	PAGE
Question Presented	2
Statement	3
A. Cahn's Termination of Sargent-Welch as a Dealer	3
B. The Parties	4
1. Sargent-Welch	4
2. Cahn	5
C. The District Court's Decision	6
D. The Decision of the Court of Appeals	7
Argument	9
I. The Petition Presents Only Factual Issues	9
II. The Decision Below Is Interlocutory	10
III. There Is No Conflict Between Circuits	11
IV. To the Extent That the Petition Contends That Misuse of Monopoly Power Is Not an Essential Element of Monopolization, Such a Contention Was Never Presented Below and Furthermore Is Wholly Without Merit	12
Conclusion	14

CITATIONS.

Cases.

Bragen v. Hudson County News Co., 321 F. 2d 864 (3d Cir. 1963) 11
SmithKline Corp. v. Eli Lilly and Co., 1978-1 Trade Cases ¶ 62,007 (3d Cir.) 11
United States v. Griffith, 334 U. S. 100 (1948) 9, 12-13

Rules.

Rules of the United States Supreme Court, Rule 19..... 1

Statutes.

Clayton Act, Section 3, 15 U. S. C. § 14 .....7, 12
Sherman Act, Section 1, 15 U. S. C. § 1 .....7, 12
Sherman Act, Section 2, 15 U. S. C. § 2 2

Other Authorities.

Stern and Gressman, *Supreme Court Practice*, (4th Ed. 1969) 10-11

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner Sargent-Welch Scientific Company ("Sargent-Welch") seeks review in this Court of an interlocutory order of the Court of Appeals remanding the case in part to the District Court for additional findings of fact. None of the relevant considerations governing review on certiorari, as set forth in this Court's Rule 19, support the grant of Sargent-Welch's petition. Its petition for certiorari is, in fact, simply a brief on the merits. Moreover, Sargent-Welch raises no important legal issues, and its position rests entirely on factual premises rejected by the courts below.

QUESTION PRESENTED.

The District Court found, in a trial limited to issues of liability, that respondents' Cahn Division ("Cahn") did not refuse to sell its "microbalances" to dealers who did not handle its "millibalances"; that in particular Cahn did not attempt to coerce petitioner Sargent-Welch into handling "millibalances" and did not require its dealers to handle them as a condition to continuing to be a dealer in "microbalances"; and that there was thus no tie-in between "microbalances" and "millibalances." These findings were specifically affirmed by the Court of Appeals and are not challenged here by Sargent-Welch. The District Court further found that there was no lessening of competition in the market for "millibalances" as a result of any conduct by Cahn, and this finding likewise remains unreversed and unchallenged. The Court of Appeals, while holding that Cahn in 1971 had a monopoly position in a submarket defined as "electromagnetic microbalances,"[1] also held that this market position had been "lawfully acquired." It concluded that Cahn did not violate Section 2 of the Sherman Act in terminating Sargent-Welch unless Cahn had thereby sought to intimidate remaining dealers to carry millibalances, and remanded the case to the District Court for further findings on this issue.

Properly stated, the question presented is whether the Court of Appeals should have held, without remand to the District Court for further findings, that the Sargent-Welch termination was unlawful even apart from any question of Cahn's intent, despite the findings of the District Court and holdings of the Court of Appeals referred to above.

1. While respondents do not agree with the holdings of the Court of Appeals on the issues of relevant market and monopoly power, they have not filed a cross-petition for certiorari at this interlocutory stage of the proceedings. Respondents reserve the right to raise these issues in any subsequent appeal in the case.

STATEMENT.

A. Cahn's Termination of Sargent-Welch as a Dealer.

Prior to May 1971, petitioner Sargent-Welch was an authorized dealer for (among some 20,000 different products purchased from approximately 3,000 vendors) certain balances and accessories manufactured by Cahn, including several balance models sometimes referred to as "electromagnetic microbalances."

On April 6, 1971, following a 74% three-year decline in Sargent-Welch's performance as a Cahn dealer,[2] Cahn notified Sargent-Welch that this relationship was being terminated, effective May 6, 1971.

As the District Court found:

> "Plaintiff's termination as an authorized Cahn ELECTROBALANCE dealer was based upon the sharp decline in plaintiff's performance on behalf of Cahn and the lack of any indication that plaintiff's performance would improve in the future. It was also based on defendant's program to consolidate sales among its more effective dealers." (Pet. App. 45a-46a.)[3]

In like vein, the Court of Appeals concluded:

> "[T]here was sufficient evidence to support the sincerity of Cahn's explanation in its termination letter to Sargent-Welch . . . . *Sargent-Welch's refusal of the millibalance line was viewed as simply another example of its bad attitude*

2. As the District Court found, Sargent-Welch's orders of Cahn products had fallen from $148,000 in 1968 to $68,262 in 1969 (an average of only $6,827 for each Sargent-Welch branch) to $39,728 in 1970 (a branch average of only $3,973). Its total orders for all ten branches in the first quarter of 1971 were $12,253, as compared with $12,052 in the same quarter of 1970, and were thus indicative of another low volume year. (Pet. App. 46a.)

3. "Pet. App." refers to the Appendix attached to Sargent-Welch's Petition for Certiorari. The abbreviation "D.App." will be used to refer to respondents' appendix submitted with their brief in the Court of Appeals.

toward Cahn products in general." (Pet. App. 25a-26a; emphasis added.)[4]

B. The Parties.

1. Sargent-Welch.

Petitioner Sargent-Welch is a large scientific supply house with annual sales of approximately $60,000,000. (Pet. App. 5a-6a, 40a-41a.)

In addition to manufacturing many products of its own, Sargent-Welch in 1971 sold products which it purchased from approximately 3,000 vendors. (Pet. App. 5a, 42a.) These products comprised a wide variety of scientific laboratory instruments, apparatus, and supplies, and included certain balances and accessories made by Cahn and many other manufacturers of

4. Top management of Sargent-Welch had been well aware of the serious decline in Sargent-Welch's performance as a Cahn dealer.

On November 19, 1970, several months before the termination, Sargent-Welch's Marketing Vice President wrote to two Sargent-Welch employees: "Our own sales volume on Cahn instruments, as you know, has dropped substantially in the last year, and has been on the decline for two or three years." (DTX 79, D.App. 53.) One of the employees replied the next day: "I had the feeling long ago that our activity on Cahn products had declined. . . . Unfortunately, we have been unable to realize any change in the general trend." (DTX 80, D.App. 54.)

On April 16, 1971, shortly after receipt of the Cahn termination notice, Sargent-Welch's Vice President for Sales wrote to Sargent-Welch branch managers, in a memo entitled "The Cahn Franchise and Our Relations with Other Manufacturers": "Needless to say, this action against our company is humiliating, *even though our sales figures on Cahn products were so low last year that it is not a serious loss in sales volume.*" (DTX 97, D.App. 55; emphasis added.) He attributed the drop in Cahn sales to "a combination of the decline in our customers' capital equipment purchases *coupled with the lack of sales and promotional effort on the part of the salesmen and our sales management.* . . ." (DTX 97, D.App. 55-56; emphasis added.) Shortly thereafter, he wrote to one of his branch managers: "I must say, however, that if our interest in the product line is determined by our purchases from a manufacturer, then Cahn is correct in assuming that we did not actively promote their line." (DTX 100, D.App. 57.)

such products. (PTX 511, pp. 32-35; PTX 511, pp. 17-31, 36-59.)

2. Cahn.

Cahn is a small manufacturer of precision balances and accessories. In 1971 it sold a total of 500 balances in the United States, for an aggregate sales volume of $608,400. Its total sales in 1971 were approximately $1,400,000. (Pet. App. 5a.)

During the 1960's and early 1970's, Cahn developed and marketed a line of balances which operated on an electromagnetic or "null-restoring" weighing principle. In 1965 and 1966, it obtained patents which cover certain aspects of these Cahn balance models. All of these Cahn balance models, both "microbalances" and "millibalances," operate on this same principle, are covered by the same patents, and (with one exception not involved in this litigation) have been marketed under the registered trademark "ELECTROBALANCE." (Pet. App. 43a.)

Cahn was the first company to develop and market commercially acceptable balances which operated on the electromagnetic principle. These balances represented a technological breakthrough, and it was several years before Cahn's large competitors offered commercially acceptable balances which operated on the same or similar principles. Cahn was highly regarded as an innovator in its field, and its reputation was enhanced by the well-known high quality and reliability of its ELECTROBALANCE line. (Pet. App. 48a-49a.)

Most of Cahn's balance products were sold to dealers like Sargent-Welch for resale to the ultimate users. Cahn was dependent on its dealers for marketing its products. (Pet. App. 51a.) At the time of the termination of Sargent-Welch in 1971, Cahn's entire sales force consisted of three salesmen. (Pet. App. 21a.)

C. The District Court's Decision.

The District Court ruled in favor of defendants on all counts of petitioner's complaint, specifically finding that "plaintiff's distributorship contract was terminated because of its poor performance" and that no antitrust violation "was proved to be a factor in the termination." (Pet. App. 54a.)

The District Court also specifically found that the termination was (1) not an exercise of monopoly power or an attempt to monopolize any relevant market (Pet. App. 36a, 54a-55a), (2) not part of an effort by Cahn to "tie" sales of some of its products to others (Pet. App. 36a-38a, 54a-55a), and (3) not a result of any price cutting by Sargent-Welch. (Pet. App. 38a-39a, 54a.)

With respect to the monopolization and attempt to monopolize claims, the court also found that Sargent-Welch had failed to satisfy its burden of proof as to the relevant market, rejecting Sargent-Welch's proposal to limit the relevant market to "electromagnetic microbalances." (Pet. App. 34a-36a, 47a, 54a.) The District Court further found that Cahn did not intend and had no power to monopolize any relevant market, and that its success in its field was due to "its patents, its skill and knowledge, and its aggressiveness." (Pet. App. 36a, 48a-50a, 55a.) In addition, the court found that Cahn did not exclude and had no power to exclude competition illegally, and that there was in fact no significant barrier to entry into the balance market in the 1971-72 period. (Pet. App. 50a-51a.) The court concluded that Cahn's termination of Sargent-Welch did not restrain competition in the sale of any balances. (Pet. App. 36a, 38a, 54a-55a.)

The District Court also rejected Sargent-Welch's contention that its termination was part of an effort to enforce an illegal "tie-in" of Cahn's "millibalances" to its "microbalances." It specifically found not only that Sargent-Welch failed to prove that Cahn had "attempted to coerce plaintiff into handling [its] new products by, for example, threatening termination," or had "refused to sell its microbalances to a dealer which would not handle the Millibalance," but also that Cahn "did not require its dealers to handle the Millibalance models as a condition for continuing to be a dealer." (Pet. App. 37a, 38a, 46a.)

The District Court further found: "Nor does the evidence show that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened," and "no effective restraint on trade in the allegedly tied product was shown." (Pet. App. 38a.)

D. The Decision of the Court of Appeals.

The Court of Appeals affirmed the District Court's findings and conclusions that the termination of Sargent-Welch was not the result of any violation by Cahn of either § 1 of the Sherman Act or § 3 of the Clayton Act. It rejected Sargent-Welch's contentions that its termination and Cahn's "dealer reduction program" were part of a conspiracy to maintain resale prices illegally. (Pet. App. 9a-11a, 25a-31a.)

It also specifically rejected Sargent-Welch's contentions that Cahn tied sales of its "millibalances" to sales of its "microbalances" and that Sargent-Welch's termination resulted from a "scheme of getting tie-ins." The Court expressly agreed with the District Court's findings that Sargent-Welch "failed to prove that defendant attempted to coerce plaintiff into handling [millibalances]," that there was no persuasive evidence that Cahn "refused to sell its microbalances to a dealer who would not handle the millibalance," and that Cahn "did not require its dealers to handle the millibalance models as a condition to continuing to be a dealer." (Pet. App. 13a-14a.)

Nor did the Court of Appeals take issue with the District Court's findings, referred to above, that the evidence did not show "that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened," and that "no effective

restraint on trade in the allegedly tied product was shown." (Pet. App. 38a.)

The Court of Appeals held only one finding of the District Court clearly erroneous, *viz.*, that concerning the relevant product market. (Pet. App. 15a.) The Court held that "electromagnetic microbalances" constituted a relevant submarket (Pet. App. 15a-19a), and on that basis concluded that Cahn held a monopoly of that submarket by virtue of its high market share. (Pet. App. 15a.) However, the Court of Appeals agreed with the District Court that Cahn's market position was "lawfully acquired." (Pet. App. 15a, n. 14.)

Turning then to the question of whether such "lawfully acquired" monopoly power had been misused, the Court of Appeals noted that the District Court's findings did not specifically "exclude the possibility" that Cahn's "dealer reduction program" or its termination of Sargent-Welch was designed to cause "surviving dealers . . . to fear that unless they handled millibalances they would not be able to buy microbalances. . . ." (Pet. App. 22a.) The Court of Appeals therefore remanded the case for additional findings of fact and conclusions of law on "[t]hese possibilities," which, it stated, "the judge who tried the case is in the best position to make." (Pet. App. 23a.)

ARGUMENT.

Sargent-Welch seeks interlocutory review of an order of the Court of Appeals remanding the case to the District Court for more specific findings on certain issues. The question at issue turns solely upon an analysis of the particular facts in the case, including a determination of the proper factual inferences to be drawn from the evidence in the record. No contested legal issues of any general significance are involved. This is patently not a case where review by this Court on certiorari is either necessary or appropriate.

I.

THE PETITION PRESENTS ONLY FACTUAL ISSUES.

Sargent-Welch asserts (p. 12) the general principle, stated in *United States* v. *Griffith*, 334 U. S. 100, 105 (1948), that it is "not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated." But that general principle is in no way at issue here.[5] Instead, the petition presents in substance only factual issues as to the application of that principle—the very reason why the Court of Appeals remanded the case to the District Court for clarification of its findings.

In the *Griffith* case, on the particular facts of that case, this Court proceeded "from the premise that the circuit buying power was unlawfully employed" (334 U. S. at 109) and that each defendant was "employing his monopoly power as a trade weapon against his competitors" (p. 107) and was "using monopoly power to expand his empire." (p. 108.) In that situation, this Court held that ascertaining the precise purpose of such conduct was not necessary *since the misuse of monopoly*

5. Indeed, the Court of Appeals expressly agreed with that principle, citing *Griffith*. (Pet. App. 20a.)

power had already been established. Here, by contrast, there has been no finding of misuse; indeed, the findings are all to the contrary. And the very reason for the remand is to obtain clarification on that issue from the District Court.

In an effort to make its petition appear to raise legal rather than factual issues, Sargent-Welch avoids explicitly challenging the findings of the lower courts. Instead, it simply injects factual assumptions and inferences into its argument which are either directly contrary to those findings or otherwise simply unsupported by the record. For example, Sargent-Welch attempts (p. 13) to draw the factual inference that Cahn's dealers were compelled to carry "millibalances" by Cahn's alleged use of a "full line criterion" in terminating some dealers—yet the Court of Appeals expressly declined to draw that inference. (Pet. App. 23a, n. 22.) Similarly, Sargent-Welch's assertion (p. 13) that the "results" of Cahn's alleged "full line policy" were "necessarily anti-competitive" contradicts the finding below that there was no evidence of any lessening of competition for "millibalances."

II.

THE DECISION BELOW IS INTERLOCUTORY.

It is plain that this is not the type of matter as to which this Court either ought to grant, or ordinarily does grant, a writ of certiorari, particularly at an interlocutory phrase of a case.

> "The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved . . . 'We do not grant a certiorari to review evidence and discuss specific facts.' *United States* v. *Johnston,* 268 U.S. 220, 227. . . . The Court is even less likely to take a case to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals.
>
> * * * * *

> "The Supreme Court will not usually grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court . . ." (Stern and Gressman, *Supreme Court Practice,* (4th Ed. 1969), pp. 172, 180.)

Even assuming, *arguendo,* there were any merit to petitioner's position, this Court's review at this juncture is clearly premature.

III.

THERE IS NO CONFLICT BETWEEN CIRCUITS.

In *Bragen* v. *Hudson County News Co.,* 321 F. 2d 864 (3d Cir. 1963), cited by Sargent-Welch (p. 14), the Court of Appeals reversed a judgment for defendant at the close of plaintiff's case in a jury trial, holding that "the plaintiff has made a sufficient showing [which] could enable a jury to find that [defendant's] business with plaintiff *was conducted through tying arrangements,*" and that the jury "could have found that *the real reason* why Hudson stopped dealing with plaintiff was because he refused to sell or display the unwanted items. . . ." (321 F. 2d at 869; emphasis added.) Here, to the contrary, it was found after a full trial that there was no tie-in; that finding was affirmed by the Court of Appeals; and the findings made so far in the case demonstrates that *"the real reason"* for Sargent-Welch's termination was its poor performance as a dealer.

In *SmithKline Corp.* v. *Eli Lilly and Co.,* 1978-1 Trade Cases ¶ 62,007 (3d Cir.), the District Court and the Court of Appeals agreed that both the purpose and the effect of the defendant's practices was to eliminate competition in an otherwise competitive market, thereby injuring the business of plaintiff, who was a direct competitor of defendant. (¶ 62,007 at p. 74,304.) Here, as stated previously, there has been no finding of either such a purpose or such an effect.

IV.

TO THE EXTENT THAT THE PETITION CONTENDS THAT MISUSE OF MONOPOLY POWER IS NOT AN ESSENTIAL ELEMENT OF MONOPOLIZATION, SUCH A CONTENTION WAS NEVER PRESENTED BELOW AND FURTHERMORE IS WHOLLY WITHOUT MERIT.

As already pointed out, the Court of Appeals remanded the case to the District Court for additional findings on the question of whether Cahn misused its purported monopoly power. Sargent-Welch apparently contends that such a remand is erroneous on the ground that misuse is irrelevant as a matter of law. If that is Sargent-Welch's position, then a further objection to the petition is that no such contention was made below. In both the District Court and the Court of Appeals, Sargent-Welch's argument (albeit unsuccessful) was that there had been such misuse—not that misuse was unnecessary. Moreover, no such contention was made in Sargent-Welch's petition for rehearing in the Court of Appeals.

In any event, such a contention is frivolous, particularly on the facts of this case. Sargent-Welch, it should be noted, does not challenge the findings of the courts below that Cahn's terminations of Sargent-Welch and certain other dealers did not violate Section 3 of the Clayton Act or Section 1 of the Sherman Act and had no anticompetitive effect in the market for "millibalances." Sargent-Welch also does not deny the Court of Appeals' statement that "the possessor of lawfully acquired monopoly power . . . is not forbidden from improving his efficiency in manufacturing or marketing, even though the effect of doing so will be to maintain or improve his sales." (Pet. App. 21a.)

Furthermore, in the very case on which Sargent-Welch chiefly relies, *United States* v. *Griffith*, 334 U. S. 100 (1948), this Court did not condemn monopoly power *per se* but instead

"... *the use of monopoly power* ... to foreclose competition, to gain a competitive advantage, or to destroy a competitor" (p. 107, emphasis added). In that case, moreover, it was found that the defendants had actively and successfully used their monopoly power in "closed" towns to restrain competition in competitive towns:

> "Appellees were concededly using their circuit buying power to obtain films. . . . Monopoly rights in the form of certain exclusive privileges were bargained for and obtained.
>
> * * * * *
>
> "On the record as we read it, it cannot be doubted that the monopoly power of appellees had some effect on their competitors and on the growth of the Griffith circuit." (334 U. S. at 109.)

In this case, however, the Court of Appeals expressly refused to accept Sargent-Welch's proffered factual inference that Cahn used its "monopoly" of "microbalances" to foist "millibalances" on reluctant dealers, citing specific evidence to the contrary. (Pet. App. 23a, n. 22.) Indeed, it specifically found that Sargent-Welch's failure to carry "millibalances," far from being used by Cahn as a separate and independent basis for the termination, "was viewed as simply another example of [Sargent-Welch's] bad attitude toward Cahn products in general." (Pet. App. 26a.) Moreover, as previously stated, it was found below that the evidence did *not* show "that competition in the market for the allegedly tied product, i.e., Millibalances, was lessened," and that "no effective restraint on trade" in millibalances was shown. (Pet. App. 38a.)

CONCLUSION.

Sargent-Welch cites no relevant considerations favoring a grant of certiorari in this case, and there are none. In addition, its position on the merits is without support in the record or in the law, and indeed depends on factual assumptions that are contrary to the findings of both courts below. For these reasons, Sargent-Welch's petition should be denied.

Respectfully submitted,

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